

<b>UNITED STATES OF AMERICA</b>	)	<b>PROTECTIVE ORDER # 3</b>
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	)	
<b>v.</b>	)	<b>Protection of Classified Information at</b>
	)	<b>Arraignment and Other Pretrial</b>
	)	<b>Proceedings</b>
<b>KHALID SHEIKH MOHAMMED</b>	)	
<b>WALID MUHAMMAD SALIH</b>	)	
<b>MUBARAK BIN ATTASH</b>	)	
<b>RAMZI BINALSHIBH</b>	)	
<b>ALI ABDUL AZIZ ALI</b>	)	
<b>MUSTAFA AHMED ADAM AL</b>	)	
<b>HAWSAWI</b>	)	<b>4 June 2008</b>

1. This Protective Order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC), to include, but not limited to:
  - a. Rules for Military Commissions (RMC) 701(f)(8) and (l)(2);
  - b. Military Commission Rule of Evidence (MCRE) 505;
  - c. Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 17-3.
  
2. The Commission has considered the following matters prior to issuing this order:
  - a. Prosecution Motion for Protective Order – Protection of Classified Information at Arraignment and all Stages of Prosecution, dated 4 June 2008.
  - b. Prosecution Proposed Protective Order #3, dated 4 June 2008.
  - c. Protective Order #3, Memorandum of Understanding, dated 4 June 2008.
  - d. Authorization to Claim National Security Privilege, The Director, Central Intelligence Agency, dated 7 November 2007.

e. Classification Guidance Pertaining to Matters Which Might Be Raised In the Case of United States v. Mohammed, et. al.

f. Declaration by The Director, Central Intelligence Agency, dated 30 May 2008.

This order and the matters listed in a thru f above will be attached to the record of trial.

The appellate exhibits containing e and f above will be sealed.

3. The Commission finds that this case is very likely to involve information that has been classified in the interests of national security as set forth by MCRE 505(b)(1) and (2) as well as by Executive Order 12958, as amended. The storage, handling, and control of this information will require special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need to know.

4. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons assisting the defense (hereinafter the "Defense") as well as any other person who comes into possession of classified information as a result of participation in this case.

5. The procedures set forth in this Protective Order, and MCRE 505 and 506, will apply to all stages of this case, subject to modification by further Order. The Prosecution has advised that it will promptly seek further protective orders to address additional issues relating to discovery and disclosure of classified information as this case progresses.

6. As used herein, the term Classified Information shall mean:

- a. Any document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958, its predecessors or as amended, as CONFIDENTIAL, SECRET or TOP SECRET, or additionally controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), or any information in such document;

- b. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the government pursuant to Executive Order 12958;
- c. Any document or information that the Defense knows or reasonably should know, contains Classified Information; or
- d. Any document or information as to which the Defense has been notified orally or in writing that such document or information contains Classified Information.
- e. Any statements made by the accused are presumptively Classified Information.
- f. The words "documents" and "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefascimilies, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;
- g. Graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings or any kind and motion pictures;
- h. Electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer tapes, disks, or thumb drives and all manner or electronic data processing storage; and
- i. Information acquired orally.

7. All Classified Documents and other matters and the Classified Information contained therein shall remain classified unless the documents bear a clear indication that they have

been declassified by the agency or department that is the originator of the document or the information contained therein (hereinafter, the "Original Classification Authority").

8. "Access to Classified Information" means having authorized access to, reviewing, reading, learning or otherwise coming to know in any manner Classified Information.

9. "Secure Area" means a physical facility accredited by the Department of Defense for the storage, handling, transmission and control of classified information at the appropriate level to match the level of classification of the information thus stored, handled, transmitted or controlled.

10. A Senior Security Advisor (SSA) has been appointed by the military judge to protect any Classified Information made available or created in connection with this case. The Senior Security Advisor is authorized to appoint Alternate Security Advisors (ASAs) as necessary. All references to the SSA herein shall be deemed to also refer to any ASAs appointed to this case. The Defense shall seek guidance, as necessary, from the SSA or an ASA with regard to the appropriate storage, handling, transmittal and use of Classified Information.

11. I have been advised that the Prosecutors assigned to this case have the requisite security clearances and a need to know to have access to Classified Information that relates to this case.

12. I find that to protect the Classified Information involved in this case, no member of the Defense, or other person shall have access to any Classified Information as a result of participation in this case unless that person shall first have:

- a. Been granted the requisite security clearance by the Department of Defense, or the Department of Justice and such clearance is verified by the SSA and;

- b. Signed the Memorandum of Understanding (MOU) attached to this Protective Order, agreeing to comply with the terms of this Protective Order. The substitution of, or removal for any reason from this case of any member of the Defense shall not release that person from compliance with the provisions of this Order;
- c. Been determined to “need to know” the Classified Information at issue by the Original Classification Authority.

13. The Prosecution will promptly seek further Protective Orders clarifying the procedures governing the Defense access to Classified Information and use of Classified Information to prepare for trial. However, in the interim, to allow this matter to proceed to arraignment and to protect Classified Information from unnecessary disclosure, until further Order of this Commission, members of the Defense currently possessing the requisite security clearances, verified by the SSA, and having signed the MOU may not disclose classified information to any person except to other members of the Defense who have verified security clearances and have signed the MOU, or to the Commission, the SSA or ASA and the Prosecution identified above. Until further Order of this Commission, the Defense may not disclose Classified Information to the accused.

14. The Defense shall not disclose Classified Information or information they know or reasonably should know is Classified during the arraignment in this case. This provision does not prohibit the Defense from discussing with the accused matters which the accused told the Defense.

15. The Defense shall comply with MCRE 505 prior to any disclosure of Classified Information at arraignment or other proceeding in this case. Specifically, written notice must be given, pursuant to MCRE 505(g) prior to any such disclosure.

16. The Office of the Chief Defense Counsel has approved Secure Areas in which the Defense can work with Classified Information. The Office of the Convening Authority shall establish procedures to assure that such Secure Areas be maintained and operated in a manner consistent with the protection of Classified Information. Documents containing Classified Information shall only be removed from such Secure Areas pursuant to Department of Defense regulations. As the presence of the SSA or an ASA may be necessary in such areas while the Defense is working, until further Order of the Commission, the SSA or ASA shall not reveal to any person any conversations he or she may overhear from Defense, nor reveal the nature of documents being reviewed by them or the work generated by them except as specifically directed by the Defense, for purposes of obtaining guidance from the Original Classification Authority (OCA) as to the proper handling or treatment of specific Classified Information. The presence of the SSA or ASA or communication by the SSA to the OCA shall not operate as a waiver of, limit, or otherwise render inapplicable, the privileges set forth in MCRE 502-504 and 513.

17. Until further Order of this Commission, any pleading or other document filed by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or the proper classification of which is uncertain, shall be filed UNDER SEAL with the SSA or ASA and shall indicate on the pleading that it is filed UNDER SEAL with the SSA. The time of submission to the SSA or ASA shall be considered the date and time of filing. The Military Commission Trial Judiciary Staff (MCTJS) is directed to enter the title of the pleading or document (unless such title is itself Classified Information) on the filings

inventory, the date it was filed and a notation that it was filed UNDER SEAL with the SSA. The SSA or ASA shall promptly serve the pleading on the Prosecution and deliver the pleading or document to the Commission. The SSA or ASA shall also promptly review the pleading and, in consultation with the appropriate representatives of the appropriate agencies, determine whether the pleading or document contains classified information in whole or in part. If the SSA or ASA determines that the pleading contains classified information, he shall ensure that the pleading or document is appropriately marked and that the classified information in the pleading or document remains UNDER SEAL. The SSA will ensure that all pleadings or documents filed with this Commission are stored in an appropriate Secure Area consistent with the highest level of classified information contained in the document. All portions of any pleading or document which do not contain classified information shall immediately be unsealed by the SSA, and provided to the Clerk of the Commission for inclusion in the record.

18. Any pleading or document filed by the Prosecution containing classified information shall be filed UNDER SEAL with the SSA. The Prosecution shall ensure that its pleadings or documents are appropriately marked to identify the classified information contained therein. The time of submission to the SSA or ASA shall be considered the date and time of filing. The MCTJS is directed to enter the title of the pleading or document on the filings inventory (unless such title is itself Classified Information), the date it was filed and a notation that it was filed UNDER SEAL with the SSA. The SSA or ASA shall promptly serve the pleading on the Defense and deliver the pleading or document to the Commission. All portions of any pleading or document which do not

contain classified information shall immediately be unsealed by the SSA, provided to the court clerk, and placed in the public record.

19. Until further Order of this Commission, the Defense shall create, review, maintain, and store all documents, notes materials or any work product containing classified information or derived from classified information only in the Secure Area.

20. All documents prepared by the Defense (including but not limited to pleadings or other documents to be filed with the Commission) which do or may contain classified information shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have complied with this Protective Order allowing them access to Classified Information, in the Secure Area on approved information technology systems and devices, and in accordance with Department of Defense regulations. All pleadings or documents and any associate materials, such as notes, drafts, copies, portable memory devices, photocopiers, or exhibits, containing any information reasonably believed to contain classified information shall be maintained in the Secure Area unless the SSA determines, in consultation with the Original Classification Authority, if necessary, that such documents are unclassified in their entirety. The SSA shall not reveal the contents of such documents to any person except the ASA.

21. No member of the Defense shall copy or reproduce any classified information, in any form, except in accordance with Department of Defense regulations governing the reproduction of Classified Information.

22. No member of the Defense shall communicate, discuss or disseminate classified information outside the Secure Area, or on any standard commercial telephone instrument or office communication system or internet or email system or in the presence



of any person who has not been granted access by the Commission to classified information.

23. Any violation or potential violation of this Protective Order shall be immediately brought to the attention of the Commission and may result in a charge of contempt of court. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention or negligent handling of classified information or documents could cause serious damage, and in some instances, exceptionally grave damage to the national security of the United States and may be used to the advantage of a foreign nation against the interests of the United States.

PROCEDURES TO PROTECT THE UNAUTHORIZED DISCLOSURE OF  
CLASSIFIED INFORMATION AT ARRAIGNMENT

24. For purposes of arraignment in this matter, and until further Order of this Commission, I find that the United States, pursuant to Executive Order and appropriate authority, has determined that the statements of the accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level.

25. Neither the Defense, nor the accused has provided written or other notice to the Commission or to the Prosecution that they reasonably expect to disclose classified information. Accordingly, pursuant to MCRE 505 and this Protective Order, neither the Defense nor the accused may disclose classified information at the arraignment.

26. I find that the accused has been exposed to information that the U.S. Government continues to protect as properly classified. To protect against the unauthorized disclosure of classified information at arraignment in this case, it is necessary for this Commission

to employ certain technical and other procedural measures designed to prevent any such unauthorized disclosure by the accused.

27. This Commission will employ a time-delay on the audio feed of the proceedings to the public in the gallery. The time-delay will be of sufficient length to guard against the unauthorized disclosure of classified information. The length of such delay shall be twenty seconds.

28. The SSA will ensure that a switch which will immediately terminate the audio feed to the public (the "Switch") will be functional and available to the Military Judge and the SSA.

29. I find that the Switch may not be activated by any person other than the Commission for the following specific information the accused may disclose at the arraignment: affirmative or negative responses to questions by the Commission; stating their names and other identifying information about themselves; and entering a plea or making a request for counsel. With respect to these statements, the Prosecution or the SSA must alert the Commission by objection before activating the Switch.

30. In the event the accused makes any statement, because such statements are presumptively classified, any person with authorized access to the Switch, and only such persons, may, if they reasonably believe classified information has been or is about to be disclosed, activate the Switch to terminate the audio feed to the public.

31. In the event any person other than the accused is about to or has made a disclosure of classified information, any person with authorized access to the Switch may activate the Switch to terminate the audio feed to the public.

32. The SSA shall immediately advise the Commission that the Switch has been activated and that the audio feed to the public has been terminated.
33. If the Switch is activated, consistent with MCRE 505(f), this Commission will immediately halt the proceedings and take a brief delay to evaluate whether or not the information disclosed is classified and subject to the National Security Privilege. Pursuant to MCRE 505(h)(1), the Prosecution may move for an *in camera* presentation concerning the invocation of the National Security Privilege or to address the disclosure of the classified information. Upon assertion of the Privilege, this Court will take suitable action to safeguard such classified information.
34. If the National Security Privilege is asserted, such information may not be disclosed except as authorized by MCRE 505.
35. If classified information is found to have been disclosed, that portion of the audio feed shall not be broadcast to the public.
36. If no classified information is found to have been disclosed, the audio feed will resume unaltered.
37. If the switch is not activated, statements by the accused that were presumptively classified when made will no longer be presumptively classified once they are broadcast to the public, based on the absence of a claim of the National Security Privilege during the designated broadcast delay period.
38. The SSA will submit the transcript of the proceedings to the Prosecution for review, in consultation with the appropriate department or agency representatives, to permit the redaction of classified information. The redacted transcript will be immediately provided to the clerk of commission. Unless otherwise ordered by the Commission, the

Prosecution shall promptly file a motion with this Commission seeking a protective order with respect to the redaction of such transcripts.

39. The SSA shall ensure a similar system to the Switch is employed with respect to any broadcast of the proceedings to any location in addition to the gallery of the courtroom (*e.g.*, any CCTV broadcast of the proceedings to a remote location).

40. All persons in the Courtroom will possess the requisite security clearances. The SSA shall verify the identity and clearances for each person present in the Courtroom.

41. Any party may file a motion for appropriate relief with regard to this order.

A handwritten signature in dark ink, consisting of a series of loops and a horizontal line extending to the right.

Ralph H. Kohlmann  
Colonel, U.S. Marine Corps  
Military Judge

Enclosure

<b>UNITED STATES OF AMERICA</b>	)	<b>PROTECTIVE ORDER # 3</b>
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	)	
	)	
<b>v.</b>	)	<b>MEMORANDUM OF UNDERSTANDING</b>
	)	
<b>KHALID SHEIKH MOHAMMED</b>	)	
<b>WALID MUHAMMAD SALIH</b>	)	
<b>MUBARAK BIN ATTASH</b>	)	
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<b>ALI ABDUL AZIZ ALI</b>	)	
<b>MUSTAFA AHMED ADAM AL</b>	)	
<b>HAWSAWI</b>	)	<b>4 June 2008</b>

1. Having familiarized myself with the applicable laws, I understand that I may be in possession of and be the future recipient of information and documents, that pertain to the national security of the United States, and which are the property of the United States, and have been classified by the United States.

2. I agree that I will never divulge, publish or reveal, either by word, conduct or any other means, such classified information and documents unless specifically authorized to do so in writing by an authorized representative of the United States government, or as required by the Rules of Military Commission or the Military Commission Rules of Evidence, or as otherwise Ordered by this Court.

3. I understand that this agreement will remain binding upon me after the conclusion of this case and any termination of my involvement in this case prior to its conclusion will not relieve me of my agreement.

4. I have received, read and understand the Protective Order entered in this case by this Court on \_\_\_\_ June 2008, and I agree to comply with the provisions contained therein.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

\_\_\_\_\_  
[Print Name]

Counsel for Defendant \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

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4. I have received, read and understand the Protective Order entered in this case by this Court on \_\_\_\_ June 2008, and I agree to comply with the provisions contained therein.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge, information and belief.

\_\_\_\_\_  
[Print Name]  
Counsel for Defendant \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness



UNITED STATES OF AMERICA	)	
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	)	<b>MOTION FOR PROTECTIVE ORDER</b>
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v.	)	<b>Protection of Classified Information at</b>
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ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	<b>4 June 2008</b>

1. **Timeliness.** This motion is filed in accordance with the timelines specified by RMC 905(b)(4) and the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.

2. **Relief Requested.**

a. The Prosecution respectfully requests the Military Judge issue the attached proposed Protective Order, to prohibit the disclosure of classified information at the upcoming arraignment of the accused and throughout all stages of proceedings in this case, pursuant to Military Commission Rules of Evidence (MCRE) 505(e), which sets forth procedures to safeguard classified information. Additionally, the Prosecution seeks appointment of a Senior Security Advisor (SSA) to assist the Commission in the

handling, storage, docketing, and other matters involving classified information.

b. In support of this motion, the Prosecution submits, pursuant to MCRE 505(h)(2), ex parte and in camera, a declaration signed by Michael V. Hayden, Director, Central Intelligence Agency (DCIA).<sup>1</sup> The Prosecution will seek additional protective orders to apply to the disclosure of classified information and other government information in the course of discovery in this case, as well as at future proceedings.

### **3. Facts.**

a. In this case the five accused are charged with conspiracy to attack civilians, attack civilian objects, intentionally cause serious bodily injury, commit murder in violation of the law of war, destroy property in violation of the law of war, and conspiring to commit terrorism and the corresponding substantive offenses through their actions in supporting the attacks of 11 September 2001.

b. The accused are all former Central Intelligence Agency (CIA) detainees who were transferred from CIA custody to the custody of the Department of Defense (DOD) at U.S. Naval Station at Guantanamo Bay, Cuba (GTMO). The accused were exposed to classified intelligence sources and

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<sup>1</sup> To the extent that notice is required under MCRE 505, this filing serves as notice to the Defense.

methods while they were in CIA custody, and thus are in a position to be able to publicly reveal this highly classified information through their own statements. Any public disclosure of this TOP SECRET (SCI) information at the upcoming arraignment or during any other proceedings in this case reasonably could be expected to cause exceptionally grave damage to the national security. The Prosecution respectfully requests, therefore, that the Military Judge issue the attached proposed Protective Order, and that steps be taken to safeguard against the disclosure of this information during the arraignment.

**4. Discussion.**

a. The Prosecution respectfully requests the Military Judge issue the attached proposed Protective Order, to prohibit the disclosure of classified information at the upcoming arraignment of the accused and throughout all stages of proceedings in this case, pursuant to Military Commission Rules of Evidence (MCRE) 505(e), which sets forth procedures to safeguard classified information.

b. Classified information will be at issue throughout this case, beginning with the arraignment. Entry of a protective order is necessary to ensure that appropriate, narrowly crafted protections are in place to protect against the unauthorized disclosure of classified

information, and to ensure the proper storage and handling of classified information both inside and outside the courtroom. As described in more detail below, the Prosecution requests that specific measures be implemented at arraignment. First, the Prosecution requests that this Commission employ a time-delay on the audio feed of courtroom proceedings in order to prevent the disclosure, intentionally or inadvertently, of classified information to members of the public who are present for the proceedings or who are watching from another designated location.<sup>2</sup>

c. The Prosecution also requests that Trial Counsel be given the opportunity to intervene or raise an objection in order to suspend broadcast of the proceedings in the event that the Trial Counsel or the SSA believes that classified information has been or is about to be disclosed by any person during the proceedings. A suspension of the broadcast of the audio portion of the proceeding by Trial Counsel-both to the those in attendance and those watching from another designated location via CCTV-will be the equivalent of the "assertion of privilege at trial" provisions of MCRE 505(f)(1), which authorizes Trial

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<sup>2</sup> The specifics concerning the application of the time delay are addressed in this Motion at paragraph 4v, below.

Counsel to object to any question, line of inquiry, or motion, that may implicate classified information, and authorizes a delay in the proceedings to permit Trial Counsel to consult with the appropriate officials as to whether to assert the National Security Privilege.<sup>3</sup> The Director of the Central Intelligence Agency has delegated the authority to claim the National Security Privilege over classified information in this case Trial Counsel and the SSA.<sup>4</sup>

d. The Prosecution further requests that this Court limit the presence of persons in the courtroom itself and those with access to any live (i.e. uninterrupted) audio feed of the proceedings only to those persons who possess the requisite TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION (SCI) clearances and the accused themselves.<sup>5</sup>

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<sup>3</sup> The Military Commissions Act of 2006 (MCA) specifically authorizes the head of a government agency (and his delegates) to claim the National Security Privilege over classified information. MCA Section 949d(f). As set forth in the attached authorization (Attachment A), the Director of the CIA has authorized certain individuals, including Trial Counsel and OMC security officials to claim the National Security Privilege on his behalf for classified information in military commission proceedings.

<sup>4</sup> See Attachment

<sup>5</sup> The DOD guard force necessary for the safety of those involved in the proceedings are cleared only to the SECRET level for the arraignment proceedings. The Prosecution has also been advised that certain detailed military assistant defense counsel, whose TOP SECRET (SCI) clearances are pending, are being considered for approval by the Senior Security Advisor to attend the arraignment. Should the accused unexpectedly disclose TOP SECRET information in front of SECRET cleared personnel, the Government can take administrative action, including providing an order limiting further dissemination of the information.

e. Finally, the Prosecution requests that this Commission order that all classified information in this case, whether now existing or subsequently created, be handled, stored and disclosed only as set forth by the applicable laws, regulations and Executive Orders governing the disclosure and handling of classified information.

f. Information classified at the TOP SECRET level and which is further subject to SCI access controls will be at issue in this case. The attached proposed Protective Order is appropriate to safeguard against any unauthorized disclosure of such classified information. The Prosecution has not been given notice that the defense intends to disclose classified information at the arraignment, as required by MCRE 505(g).<sup>6</sup> Consequently, the defense is prohibited from disclosing classified information at the arraignment, pursuant to MCRE 505(f). Moreover, an arraignment is largely an administrative proceeding, designed to identify the accused, present him with the charges against him, inform him of his relevant rights under the MCA, ascertain his decision regarding counsel, and receive the entry of a plea. Therefore, there is no

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<sup>6</sup> To the extent the Defense may claim that they were not aware that the information the Prosecution seeks to protect by this Protective Order is classified, specifically any statement by the accused relating to their detention by the CIA, this Motion is notice to the Defense of such classification.

need for the defense to disclose any classified information at the arraignment, regardless of any notice requirement.

g. The Prosecution will seek additional protective orders to govern additional issues regarding the discovery and disclosure of classified information in this case. Until such orders are addressed by the parties and entered by the Commission, however, the attached proposed Protective Order is appropriate to safeguard the handling and disclosure of classified information. The requested procedures are identical to the practices regulating the handling, storage, and sharing of classified information which all persons who have received a security clearance must comply. However, to protect the classified information specific to this case, and allow the Commission to comply with its obligations pursuant to MCRE 505(a) and (e)(1), the attached proposed Protective Order would allow the Commission to enforce these requirements on its own accord.

#### **The National Security Privilege and MCRE 505**

h. MCRE 505 recognizes the importance of protecting classified information and states that "classified information *shall* be protected and is privileged from disclosure if disclosure would be detrimental to the national security" and applies to all stages of the

proceedings. MCRE 505(a) (emphasis added). The MCA specifically authorizes the head of a government agency (and his delegates) to claim the national security privilege over classified information. MCA § 949d(f). Any disclosure of information subject to the National Security Privilege may be made only in conformity with the procedural safeguards of MCRE 505. See MCRE 505(a) et seq.

i. Much like the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, in Article III Courts and Military Rule of Evidence 505 in military courts, MCRE 505 was implemented to provide procedures for the protection, discovery and disclosure of classified information in connection with military commission proceedings. Further, MCRE 505 addresses an accused's right to obtain and introduce classified material, as well as the Prosecution's duty to protect sensitive classified information from disclosure.<sup>7</sup>

j. MCRE 505 also sets forth the procedures for allowing discovery and disclosure of classified information in this case. MCRE 505 specifically empowers this Commission to hold a pretrial session to address classified

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<sup>7</sup> CIPA, and the case law applying and interpreting CIPA, can be instructing in applying and interpreting MCRE 505. Indeed, the express language of MCRE 505(e)(1)(A)-(G) tracks CIPA's legislative history. Compare MCRE 505(e)(1)(A)-(G) with S. Rep. No. 96-823, reprinted at 1980 U.S. Code Cong. & Ad. News, 4294, 4299 (96<sup>th</sup> Cong. 2d Sess.).



information issues, MCRE 505(d), and requires this Commission to enter appropriate protective orders to safeguard classified information, MCRE 505 (e)(1) and (3). As set forth in MCRE 505(e)(1)(A)-(G), the Protective Order may prohibit the disclosure of classified information except as authorized by the Commission, require storage in a manner appropriate for the level of classification assigned to the material, regulate the making and handling of notes taken from material containing classified information, and authorize the assignment of government security personnel and provision of government storage facilities.

k. With regard to disclosure of classified information by the defense at any proceeding, the MCRE requires that the defense give prior written notice to the Commission and Trial Counsel if the defense reasonably expects to disclose or cause the disclosure of classified information. MCRE 505(g). If no notice has been given, the MCRE prohibits the defense from disclosing information known or believed to be classified until they provide notice and the Prosecution has an opportunity to seek a determination from the Court. MCRE 505(g)(4). This notice provision is a linchpin of MCRE 505 in that it provides that this Commission and the Prosecution are able to

address any potential disclosure of classified information before such disclosure is made in order to protect the national security.

### **Pretrial Conference and Protective Orders**

#### **1. Definition of Terms**

1) Section 505(b)(1) of the MCRE defines classified information as follows:

[A]ny information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

Section (b)(2) defines "national security" to mean "the national defense and foreign relations of the United States."

2) Section (b)(3) defines in camera presentation as a conference under the provisions of RMC 802, except that, at the request of Trial Counsel, the accused shall be excluded. RMC 802 provides that the Military Judge, upon request of any party or sua sponte, may order a conference with the parties to consider matters that will promote a fair and expeditious trial. Additionally, an in camera presentation may also be ex parte where Trial Counsel will make the presentation to the Military Judge, outside the

presence of the accused and defense counsel. MCRE 505(b)(3) and (h)(2).

**m. Protective Orders** Section (e) of MCRE 505 authorizes the entry of protective orders governing the handling and disclosure of classified information. Section (e)(1) provides that "[t]he military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense" and also information known to the defense before trial. The protective order applies to the classified information at issue furnished both to the Commission, and to defense counsel, and to classified information known to the accused. Additionally, at the request of the Prosecution, the Military Judge shall enter any additional protective orders as are necessary for the protection of national security information, including protective orders limiting the scope of discovery, and direct and cross-examination of witnesses. MCRE 505(e)(2).<sup>8</sup>

**The Classified Information at Issue in this Case**

n. As stated above, the accused in this case are in possession of highly classified information regarding their

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<sup>8</sup> CIPA similarly provides, in Section 3, that U.S. District Courts are authorized to issue protective orders to prevent the disclosure or dissemination of classified information that could compromise national security. United States v. Rezaq, 156 F.R.D. 514, 523 (D.D.C. 1994); United States v. Musa, 833 F. Supp. 752 (E.D.Mo. 1993)

capture, detention and interrogation while in CIA custody, the disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security. While counsel for the accused has not provided notice of any reasonable expectation to disclose this or other classified information, the accused themselves possess this information and the United States has determined that statements made by the accused are presumptively classified. The Prosecution cannot know whether the accused intend to make any such classified disclosures at the arraignment. Therefore, we request that the procedures set forth in the proposed Protective Order be put in place to prevent the accused from making any such disclosures to the public.<sup>9</sup>

o. To assess the importance of this classified information, a review of events leading up to this Commission is called for. On September 6, 2006, the President announced that fourteen high value terrorists had been transferred from CIA custody to the custody of the

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<sup>9</sup>CIPA's legislative history recognized and contemplated the threat posed by defendants who acquired classified information before the initiation of prosecution who may wish to then disclose that classified information in the course of the prosecution. United States v. Pappas, 94 F.3d 795, 799-800 (2d Cir. 1996). CIPA's legislative history makes it clear that Congress intended Section 3 protective orders to apply to defendant's previously acquired information, and may prohibit disclosure of such information in connection with the trial of the case. Id.

Department of Defense at the U.S. Naval Station at Guantanamo Bay (GTMO). This announcement was the first official acknowledgement by the U.S. Government of the CIA's high-value terrorist detention program (the "Program") that was instituted in the aftermath of the attacks of 11 September 2001, whereby the CIA maintains clandestine detention facilities at locations outside the United States for the purpose of detaining and interrogating a very small group of high-value terrorists. Information regarding the Program is treated as TOP SECRET//SCI.

p. By acknowledging that the accused in this case were held in the CIA's detention program, the Government has acknowledged that the accused themselves may have come into possession of the very information about the CIA program that the U.S. Government must protect from disclosure. This includes the location of overseas detention facilities, the identities of cooperating foreign governments, identifying information concerning CIA officers, the conditions of confinement and interrogation techniques. Steps must be taken, therefore, to prevent the disclosure of this classified information before and during trial, including during arraignment proceedings, where the

accused will have their first opportunity to speak in the presence of the press and other uncleared individuals.

q. Pursuant to MCRE 505(b)(1), any statements made by the accused or information relating to or concerning the detention and interrogation of the accused are classified information within the terms of MCRE 505 and are, therefore, the proper subject of an appropriate protective order.

**Measures Needed to Protect Classified Information from Disclosure**

r. **Clearances** As noted above, it is the position of the U.S. Government that statements made by the accused are presumptively classified at the TS/SCI level. Thus, notwithstanding the issue of the guard force and the detailed military defense counsel discussed above, all personnel with whom the detainee has or will have substantive contact must have a TS/SCI clearance and be briefed into the relevant SCI program. This includes attorneys for the accused, interpreters, and courtroom personnel, including the clerk and the Senior Security Adviser (SSA) and Alternate Security Advisors (ASAs). The requirement in the proposed Protective Order limiting courtroom access to appropriately cleared persons is appropriate in this case.

**s. Senior Security Adviser** The Prosecution respectfully requests the Military Judge appoint a Senior Security Advisor to ensure the proper storage, handling and transmission of classified information in these cases.<sup>10</sup> The SSA will be available to advise the Commission on issues regarding classified information, and will assist the defense and prosecution with the handling of classified information, including pleadings, filings and documents produced during discovery. The SSA is a liaison between the owners of the classified information and will solicit from them the necessary protections to avoid harm to national security through protection of the information, including at open court proceedings. The appointment and use of the SSA as set forth in the proposed Protective Order is appropriate in this case.

**t. Storage, Handling and Transmission of Classified Information**

1) In order to ensure the proper handling and storage of classified information, approved and accredited Secure Compartmented Information Facilities (SCIFs) have been constructed at GTMO for use by the Military Judge, defense counsel, and the Prosecution during pre-trial and trial proceedings. The Prosecution's proposed Protective

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<sup>10</sup> The Prosecution Proposed Protective Order also requests the Military Judge authorize the SSA to appoint additional Alternate Security Advisors (ASAs) as necessary.

Order further details the procedures for maintaining and operating these secure areas pursuant to Department of Defense regulations. Under the terms of the Protective Order, if there are any questions as to the treatment or handling of classified information, defense counsel shall seek guidance from the Senior Security Advisor.

2) The proposed Protective Order provides only for the proper handling of classified information and does not substantively impact the defense of the accused. The proposed requirements are consistent with the requirements previously agreed to by any person who has been granted the requisite TS/SCI clearance. Moreover, these requirements are specifically contemplated by MCRE 505(e)(1)(B) and (F) providing that this Court shall enter an appropriate Protective Order requiring storage of classified material in a manner appropriate for the level of classification of the material and regulating the making and handling of notes containing classified information. The proposed procedures are appropriate.

**u. Delegation of National Security Privilege Claims**

Pursuant to MCA 949d(f)(1)(d), the Director of the CIA has delegated his authority to assert the National Security Privilege over classified information for which his agency is the originator of the information to Office of Military



Commissions (OMC) security personnel and Trial Counsel in military commission cases. The Senior Security Advisor shall consult, when necessary, with the appropriate CIA representative on questions that arise with regard to classification or disclosure of information provided to the defense.<sup>11</sup>

#### **v. Courtroom Security Measures**

1) To protect classified information from disclosure during the arraignment proceedings, as required under MCRE 505, certain safeguards have already been put into place in the courtroom, including a partition separating the press and members of the public from the courtroom personnel, the Prosecution, defense counsel and the accused. There will be an audio feed of the proceedings directly into the gallery. The Prosecution requests that there be a short delay in the feed, so that in the event that classified information is disclosed in open court, the government has the opportunity to prevent its public disclosure.<sup>12</sup> The Prosecution believes that a delay of 20-30 seconds is likely required, however, the Prosecution recommends that the Military Judge and the SSA

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<sup>11</sup> The instant motion is being submitted primarily for arraignment and we believe that the only classified information that may be implicated at this time is originated from the CIA. The Prosecution will be filing a subsequent motion for a protective order to govern discovery which will also address classified information from other agencies.

<sup>12</sup> The technology allowing this time delay is already in place.

consult with the interpreters and technical experts to determine how long the interpreters will let the accused or other non-English speaking witnesses talk before their statements are translated and rebroadcast. The delay will allow the Military Judge, SSA, or Trial Counsel to suspend the audio feed so that classified information cannot be heard by members of the public should it be disclosed.<sup>13</sup> This suspension of the feed will also have the effect of preventing the audio being transmitted to any remote viewing area. If classified information is disclosed by any person, but is prevented from public disclosure because of the time delayed audio feed, that portion of the audio feed will not be disclosed, but will remain part of the classified record of proceedings.

2) Because the Prosecution cannot predict what the accused will say or whether they will seek to make statements regardless of whether the Military Judge permits them to do so, the time delay is the only effective means available to prevent any purposeful or inadvertent

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<sup>13</sup> The Prosecution anticipates the need for a delay for two reasons. First, the accused may be speaking in a foreign language and there are likely to be persons present in the gallery who understand that language. The accused's statements will need to be translated so that security officials can assess whether the statements are classified and therefore must not be broadcasted to the gallery before the statements are broadcast to the gallery in the foreign language. Additionally, a longer delay will allow the security officials to consider whether what is said is actually classified. If the security officials are rushed to make such a decision it is likely that in an abundance of caution they will error on the side of interrupting the feed.

disclosure of classified information to any unauthorized person.

3) As set forth in the attached proposed Protective Order, and as contemplated by MCRE 505(f) in similar circumstances, any time any person, including the accused, has disclosed or is about to potentially disclose classified information, upon order of the Military Judge, determination by the SSA or objection by Trial Counsel, the audio feed will be terminated and proceedings will be suspended to allow the Commission to take suitable action to safeguard classified information.<sup>14</sup> Suitable action may include a short delay in the proceedings to allow a review of Trial Counsel's claim of privilege and to allow Trial Counsel to consult, if necessary, with the department or agency concerned as to whether the privilege should be asserted.<sup>15</sup> MCRE 505(f).

4) This procedure is not substantively different from typical proceedings in which counsel asks a witness a question and a witness begins to answer just as opposing counsel stands to object to the admissibility of the question or answer. In such a scenario, the witness is interrupted and the judge makes an evidentiary ruling

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<sup>14</sup> A button muting the public audio feed is accessible to the Military Judge and the SSA.

<sup>15</sup> As noted supra, both Trial Counsel and the SSA have been delegated the authority to assert the National Security Privilege.

before the witness is allowed to proceed. In this case however, to prevent damage to the national security from disclosure made before the proceedings can be suspended, the audio will be delayed to permit the Military Judge to rule before any disclosure is made.

5) If, during this delay, the Prosecution determines that it will not assert any privilege, or that classified information was not disclosed and is not at risk of disclosure, the proceedings will resume and the audio feed, with the time delay, will resume with no alteration to the audio feed.

6) The audio feed will resume only upon order of the Commission when the proceedings resume. Additionally, any transcript of the proceedings will be reviewed by the CIA Associate Information Review Officer (AIRO) prior to release, in order to ensure that classified information is properly redacted from the transcript. The redacted transcript will be submitted to the Commission and the Prosecution will seek an appropriate Protective Order seeking redaction of the classified information. These measures are necessary and appropriate to enforce the requirement under MCRE 505 that classified information be protected from disclosure at all stages of the proceedings.

5. **Conclusion** Wherefore, the Prosecution requests that the Commission consider this foregoing memorandum in determining matters related to classified information that may arise in connection with the above-captioned case, and respectfully requests that the Commission enter the attached proposed Protective Order to protect classified information from disclosure prior to commencement of the arraignment and require Defense Counsel to execute the Memorandum of Understanding appended to the Protective Order.

6. **Oral Argument**. The Prosecution does not request oral argument.

7. **Witnesses**. None.

8. **Certificate of Conference**. The Prosecution provided the Defense with a copy of the Proposed Protective Order and Memorandum of Understanding on 3 June 2008 at 1618. The Prosecution had not talked to any Defense Counsel at the time of this filing.

9. **Additional Information**. None.

10. **Attachments**.

- a. Delegation of Authority
- b. Proposed Protective Order with attached MOU.

11. Submitted by:

Robert L. Swann  
Prosecutor  
U.S. Department of Defense

Edward Ryan  
Prosecutor  
U.S. Department of Justice

Clayton Trivett, Jr.  
Prosecutor  
U.S. Department of Defense

Thomas P. Swanton  
Prosecutor  
U.S. Department of Justice

By: \_\_//s//\_\_\_\_\_  
Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Prosecutor

<b>UNITED STATES OF AMERICA</b>	)	<b>PROTECTIVE ORDER # 3</b>
	)	
	)	
	)	<b>(PROPOSED)</b>
<b>v.</b>	)	<b>Protection of Classified Information at</b>
	)	<b>Arraignment and Other Pretrial</b>
	)	<b>Proceedings</b>
<b>KHALID SHEIKH MOHAMMED</b>	)	
<b>WALID MUHAMMAD SALIH</b>	)	
<b>MUBARAK BIN ATTASH</b>	)	
<b>RAMZI BINALSHIBH</b>	)	
<b>ALI ABDUL AZIZ ALI</b>	)	
<b>MUSTAFA AHMED ADAM AL</b>	)	
<b>HAWSAWI</b>	)	<b>4 June 2008</b>

1. This Protective Order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC), to include, but not limited to:
  - a. Rules for Military Commissions (RMC) 701(f)(8) and (l)(2);
  - b. Military Commission Rule of Evidence (MCRE) 505;
  - c. Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 17-3.
  
2. The Commission finds that this case will involve information that has been classified in the interests of national security as set forth by MCRE 505(b)(1) and (2) as well as by Executive Order 12958, as amended. The storage, handling, and control of this information will require special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need to know.
  
3. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons

assisting the defense (hereinafter the “Defense”) as well as any other person who comes into possession of classified information as a result of participation in this case.

4. The procedures set forth in this Protective Order, and MCRE 505 and 506, will apply to all stages of this case, subject to modification by further Order. The Prosecution has advised that it will promptly seek further protective orders to address additional issues relating to discovery and disclosure of classified information as this case progresses, which, when appropriate, will allow Defense Counsel to address such issues in response to Prosecution filings.

5. As used herein, the term Classified Information shall mean:

- a. Any document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958, its predecessors or as amended, as CONFIDENTIAL, SECRET or TOP SECRET, or additionally controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), or any information in such document;
- b. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the government pursuant to Executive Order 12958;
- c. Any document or information that the Defense knows or reasonably should know, contains Classified Information; or
- d. Any document or information as to which the Defense has been notified orally or in writing that such document or information contains Classified Information.
- e. For purposes of the arraignment in this matter, and until further Order of this Court, any statements made by the accused are presumptively Classified Information.
- f. The words “documents” and “information” shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies



(whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefascimilies, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

- g. Graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings or any kind and motion pictures;
- h. Electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer tapes, disks, or thumb drives and all manner or electronic data processing storage; and
- i. Information acquired orally.

6. All Classified Information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the originator of the document or the information contained therein (hereinafter, the “Original Classification Authority”).

7. “Access to Classified Information” means having authorized access to, reviewing, reading, learning or otherwise coming to know in any manner Classified Information.

8. “Secure Area” means a physical facility accredited by the Department of Defense for the storage, handling, transmission and control of classified information at the appropriate level to match the level of classification of the information thus stored, handled, transmitted or controlled.

9. A Senior Security Advisor (SSA) shall be appointed to protect any Classified Information made available or created in connection with this case. The Senior Security

Advisor can appoint additional Alternate Security Advisors (ASAs) as necessary. All references to the SSA herein shall be deemed to also refer to any ASAs appointed to this case. The Defense shall seek guidance, as necessary, from the SSA or an ASA with regard to the appropriate storage, handling, transmittal and use of Classified Information.

10. I have been advised that the Prosecutors assigned to this case have the requisite security clearances and a need to know to have access to Classified Information that relates to this case.

11. I find that to protect the Classified Information involved in this case, no member of the Defense, or other person shall have access to any Classified Information as a result of participation in this case unless that person shall first have:

- a. Been granted the requisite security clearance by the Department of Defense, or the Department of Justice and such clearance is verified by the SSA and;
- b. Signed the Memorandum of Understanding (MOU) attached to this Protective Order, agreeing to comply with the terms of this Protective Order. The substitution of, or removal for any reason from this case of any member of the Defense shall not release that person from compliance with the provisions of this Order;
- c. Been determined to “need to know” the Classified Information at issue by the Original Classification Authority.

12. The Prosecution will promptly seek further Protective Orders clarifying the procedures governing the Defense access to Classified Information and use of Classified Information to prepare for trial. However, in the interim, to allow this matter to proceed to arraignment and to protect Classified Information from unnecessary disclosure, until further Order of this Commission, members of the Defense currently possessing the requisite security clearances, verified by the SSA, and having signed the MOU may not

disclose classified information to any person except to other members of the Defense who have verified security clearances and have signed the MOU, or to the Commission, the SSA or ASA and the Prosecution identified above. Until further Order of this Commission, the Defense may not disclose Classified Information to the accused.

13. The Defense shall not disclose Classified Information or information they know or reasonably should know is Classified during the arraignment in this case.

14. The Defense shall comply with MCRE 505 prior to any disclosure of Classified Information at arraignment or other proceeding in this case. Specifically, written notice must be given, pursuant to MCRE 505(g) prior to any such disclosure.

15. The Office of the Chief Defense Counsel has approved Secure Areas in which the Defense can work with Classified Information. The Office of the Convening Authority shall establish procedures to assure that such Secure Areas be maintained and operated in a manner consistent with the protection of Classified Information. Documents containing Classified Information shall only be removed from such Secure Areas pursuant to Department of Defense regulations. As the presence of the SSA or an ASA may be necessary in such areas while the Defense is working, until further Order of the Commission, the SSA or ASA shall not reveal to any person any conversations he or she may overhear from Defense, nor reveal the nature of documents being reviewed by them or the work generated by them except as specifically directed by the Defense, for purposes of obtaining guidance from the Original Classification Authority (OCA) as to the proper handling or treatment of specific Classified Information. The presence of the SSA or ASA or communication by the SSA to the OCA shall not operate as a waiver of,

limit, or otherwise render inapplicable, the privileges set forth in MCRE 502-504 and 513.

16. Until further Order of this Commission, any pleading or other document filed by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or the proper classification of which is uncertain, shall be filed UNDER SEAL with the SSA or ASA and shall indicate on the pleading that it is filed UNDER SEAL with the SSA. The time of submission to the SSA or ASA shall be considered the date and time of filing. The Clerk of the Court is directed to enter the title of the pleading or document (unless such title is itself Classified Information) on the filings inventory, the date it was filed and a notation that it was filed UNDER SEAL with the SSA. The SSA or ASA shall promptly serve the pleading on the Prosecution and deliver the pleading or document to the Court. The SSA or ASA shall also promptly review the pleading and, in consultation with the appropriate representatives of the appropriate agencies, determine whether the pleading or document contains classified information in whole or in part. If the SSA or ASA determines that the pleading contains classified information, he shall ensure that the pleading or document is appropriately marked and that the classified information in the pleading or document remains UNDER SEAL. The SSA will ensure that all pleadings or documents filed with this Court are stored in an appropriate Secure Area consistent with the highest level of classified information contained in the document. All portions of any pleading or document which do not contain classified information shall immediately be unsealed by the SSA, and provided to the court clerk for inclusion in the record.

17. Any pleading or document filed by the Prosecution containing classified information shall be filed UNDER SEAL with the SSA. The Prosecution shall ensure that its pleadings or documents are appropriately marked to identify the classified information contained therein. The time of submission to the SSA or ASA shall be considered the date and time of filing. The Clerk of the Commission is directed to enter the title of the pleading or document on the filings inventory (unless such title is itself Classified Information), the date it was filed and a notation that it was filed UNDER SEAL with the SSA. The SSA or ASA shall promptly serve the pleading on the Defense and deliver the pleading or document to the Commission. All portions of any pleading or document which do not contain classified information shall immediately be unsealed by the SSA, provided to the court clerk, and placed in the public record.

18. Until further Order of this Commission, the Defense shall create, review, maintain, and store all documents, notes materials or any work product containing classified information or derived from classified information only in the Secure Area.

19. All documents prepared by the Defense (including but not limited to pleadings or other documents to be filed with the Commission) which do or may contain classified information shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have complied with this Protective Order allowing them access to Classified Information, in the Secure Area on approved information technology systems and devices, and in accordance with Department of Defense regulations. All pleadings or documents and any associate materials, such as notes, drafts, copies, portable memory devices, photocopiers, or exhibits, containing any information reasonably believed to contain classified information shall be maintained in the Secure

Area unless the SSA determines, in consultation with the Original Classification Authority, if necessary, that such documents are unclassified in their entirety. The SSA shall not reveal the contents of such documents to any person except the ASA.

20. No member of the Defense shall copy or reproduce any classified information, in any form, except in accordance with Department of Defense regulations governing the reproduction of Classified Information.

21. No member of the Defense shall communicate, discuss or disseminate classified information outside the Secure Area, or on any standard commercial telephone instrument or office communication system or internet or email system or in the presence of any person who has not been granted access by the Commission to classified information.

22. Any violation or potential violation of this Protective Order shall be immediately brought to the attention of the Commission and may result in a charge of contempt of court. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention or negligent handling of classified information or documents could cause serious damage, and in some instances, exceptionally grave damage to the national security of the United States and may be used to the advantage of a foreign nation against the interests of the United States.

PROCEDURES TO PROTECT THE UNAUTHORIZED DISCLOSURE OF  
CLASSIFIED INFORMATION AT ARRAIGNMENT

23. For purposes of arraignment in this matter, and until further Order of this Commission, I find that the United States, pursuant to Executive Order and appropriate

authority, has determined that the statements of the accused are to be treated as classified information, classified at the TOP SECRET//SCI level.

24. Neither the Defense, nor the accused has provided written or other notice to the Commission or to the Prosecution that they reasonably expect to disclose classified information. Accordingly, pursuant to MCRE 505 and this Protective Order, neither the Defense nor the accused may disclose classified information at the arraignment.

25. I find that the accused has been exposed to information that the U.S. Government continues to protect as properly classified. To protect against the unauthorized disclosure of classified information at arraignment in this case, it is necessary for this Commission to employ certain technical and other procedural measures designed to prevent any such unauthorized disclosure by the accused.

26. This Commission will employ a time-delay on the audio feed of the proceedings to the public in the gallery. The time-delay will be of sufficient length to guard against the unauthorized disclosure of classified information. The length of such delay shall be determined by the SSA in consultation with the Commission, but shall be no less than 20 seconds **[note-in its Motion, the Prosecution recommends that the Commission consult with the parties, interpreters, and other technical experts in determining the appropriate time-delay]**.

27. The SSA will ensure that a switch which will immediately terminate the audio feed to the public (the “Switch”) will be functional and available to the Military Judge and the SSA.

28. In the event the accused makes any statement, because such statements are presumptively classified, any person with authorized access to the Switch, and only such

persons, may, if they reasonably believe classified information has been or is about to be disclosed, activate the Switch to terminate the audio feed to the public.

29. I find that the Switch may not be activated by any person other than the Commission for the following specific information the accused may disclose at the arraignment:

affirmative or negative responses to questions by the Commission; stating their names and other identifying information about themselves; and entering a plea or making a request for counsel. With respect to these narrow specific disclosures, the Prosecution or the SSA must alert the Commission by objection before activating the Switch.

30. In the event any person other than the accused is about to or has made a disclosure of classified information, any person with authorized access to the Switch may activate the Switch to terminate the audio feed to the public.

31. The SSA shall immediately advise the Commission that the Switch has been activated and that the audio feed to the public has been terminated.

32. If the Switch is activated, consistent with MCRE 505(f), this Commission will immediately suspend the proceedings and allow a brief delay to evaluate whether or not the information disclosed is classified and subject to the National Security Privilege.

Pursuant to MCRE 505(h)(1), the Prosecution may move for an *in camera* presentation concerning the invocation of the National Security Privilege or to address the disclosure of the classified information. Upon assertion of the Privilege, this Court will take suitable action to safeguard such classified information.

33. If the National Security Privilege is asserted, such information may not be disclosed except as authorized by MCRE 505.



34. If classified information is found to have been disclosed, that portion of the audio feed shall not be broadcast to the public.
35. If no classified information is found to have been disclosed, the audio feed will resume unaltered.
36. The SSA will submit the transcript of the proceedings to the Prosecution for review, in consultation with the appropriate department or agency representatives, to permit the redaction of classified information. The redacted transcript will be immediately provided to the clerk of court. Unless otherwise ordered by the Commission, the Prosecution shall promptly file a motion with this Commission seeking a protective order with respect to the redaction of such transcripts.
37. The SSA shall ensure a similar system to the Switch is employed with respect to any broadcast of the proceedings to any location in addition to the gallery of the courtroom (*e.g.*, any CCTV broadcast of the proceedings to a remote location).
38. All persons in the Courtroom will possess the requisite security clearances. The SSA shall verify the identity and clearances for each person present in the Courtroom.

Ralph H. Kohlmann  
Colonel, U.S. Marine Corps  
Military Judge

Enclosure



THE DIRECTOR  
CENTRAL INTELLIGENCE AGENCY  
WASHINGTON, D.C. 20505

AUTHORIZATION TO CLAIM NATIONAL SECURITY PRIVILEGE

A. Pursuant to 10 U.S.C. § 949d(f), which authorizes the assertion and delegation of the National Security Privilege over disclosure of classified information which would be detrimental to the national security, I hereby specifically authorize the categories of officials and individuals listed in Section B to claim the National Security Privilege on my behalf.

B. The following officials and individuals involved in military commission proceedings are hereby authorized to claim the National Security Privilege and make all findings necessary to such a claim, including the findings that information is properly classified and disclosure of the information would be detrimental to the national security, pursuant to 10 U.S.C. § 949d(f)(1)(B)(i) & (ii).

1. Central Intelligence Agency (CIA) Office of General Counsel (OGC) attorneys;
2. CIA Original Classification Authorities (OCAs), authorized under Section 1.3 of Executive Order 12958, as amended;
3. CIA Information Review Officers and Associate Information Review Officers (IROs and AIROs, respectively);
4. CIA security officials and Office of Military Commission security officials;
5. Trial Counsel, as defined by 10 U.S.C. § 948k(b); and
6. Current and former CIA personnel who are military commission witnesses.

AUTHORIZATION TO CLAIM NATIONAL SECURITY PRIVILEGE

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C. Nothing in this specific delegation of authority shall be construed to negate or otherwise detract from the statutory presumption provided in 10 U.S.C. § 949d(f)(1)(C) that the authority of a representative, witness, or trial counsel to claim the privilege and make the necessary finding is presumed in the absence of evidence to the contrary.

  
\_\_\_\_\_  
Director, Central Intelligence Agency

7 November 2007  
Date